U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 19099221

Date: NOV. 17, 2021

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a development director, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner satisfied at least three of the initial evidentiary criteria for this classification. The Petitioner appealed that decision to our office, and we dismissed the appeal. We determined that the Petitioner met the requisite initial evidentiary requirements but concluded in a final merits determination that he did not establish his sustained national or international acclaim and that he is among the small percentage of individuals at the very top of his field. The Petitioner subsequently filed two motions, which we also dismissed. The matter is now before us on a combined motion to reopen and motion to reconsider.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon review, we will dismiss both motions.

I. MOTION REQUIREMENTS

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must (1) state the reasons for reconsideration and establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy, and (2) establish that the decision was incorrect based on the evidence in the record of proceedings at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

The regulation at 8 C.F.R. § 103.5(a)(1)(i) limits our authority to reopen or reconsider to instances where the Petitioner has shown "proper cause" for that action. Thus, to merit reconsideration, a petitioner must not only meet the formal filing requirements (such as submission of a properly completed Form I-290B, Notice of Appeal or Motion, with the correct fee), but also show proper cause for granting the motion. We cannot grant a motion that does not meet applicable requirements. *See* 8 C.F.R. § 103.5(a)(4).

II. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals with extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation. The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If the petitioner does not submit this evidence, then they must provide sufficient qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

III. ANALYSIS

As a preliminary matter, we note that by regulation, the scope of a motion is limited to "the prior decision," which, in this case, was our dismissal of the Petitioner's previous combined motion to reopen and motion to reconsider. *See* 8 C.F.R. § 103.5(a)(1)(i). The issue before us is whether the Petitioner has submitted new facts to warrant reopening or established that our decision to dismiss the previous motion was based on an incorrect application of law or USCIS policy.

A. Prior AAO Decisions

In our decision dismissing the Petitioner's appeal, we determined that although he met the initial evidence requirements by satisfying three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x), he did not establish his sustained national or international acclaim and that he is among the small percentage of individuals at the very top of his field. *See* 8 C.F.R. 204.5(h)(2).

In the Petitioner's first motion, a motion to reconsider, he argued that we overlooked or did not properly weigh certain evidence related to the awards, judging, and original contributions criteria at 8 C.F.R. § 204.5(h)(3)(i), (iv) and (v). He asserted that proper consideration of that evidence should have resulted in a conclusion in the final merits determination that he established his sustained acclaim and placement among the small percentage of individuals at the very top of his field. In dismissing the motion to reconsider, we considered each of his claims in turn and explained how our appellate decision did in fact address the specific evidence he claimed had been overlooked. We observed that while the Petitioner may have disagreed with our assessment of that evidence, he did not establish that

we had overlooked it in adjudicating his appeal, or that we had misapplied law or USCIS policy in our evaluation of such evidence. Finally, we acknowledged the Petitioner's request that we consider new evidence submitted for the first time in support of his motion to reconsider. We did not consider the new evidence, emphasizing that a motion to reconsider must establish that our prior decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

In his second motion, a combined motion to reopen and motion to reconsider, the Petitioner once again claimed that we failed to consider certain evidence he submitted in support of the awards, judging and original contributions criteria at 8 C.F.R.§ 204.5(h)(3)(i), (iv) and (v) in adjudicating his appeal. The Petitioner, however, made no reference to our decision dismissing his previous motion to reconsider, but rather focused on our appellate decision.

In dismissing the motion to reconsider, we observed that the Petitioner's brief was essentially identical to the previous brief submitted in support of his first motion. Although the Petitioner contended that we erred in our dismissal of the appeal, he did not attempt to identify or rebut any specific errors in our most recent decision, or establish how we had misapplied the law or USCIS policy in dismissing the previous motion to reconsider. Instead, the Petitioner maintained that we erred in our adjudication of the appeal by adhering to *Kazarian* and applicable USCIS policy. Again, while our appellate decision was not the subject of the Petitioner's motion, we nevertheless addressed the Petitioner's assertion that we should have relied on *Buletini v. INS*, 850 F. Supp. 1222 (E.D. Mich. 1994) and other pre-*Kazarian* federal district court decisions rather than *Kazarian* and binding USCIS policy guidance. We determined that the Petitioner's assertions were not persuasive, noting that the *Buletini* decision does not clearly conflict with the *Kazarian* court's characterization of the adjudication process as including a final merits determination.

Finally, with regard to the Petitioner's motion to reopen, we noted that he did not present new facts in his brief or submit any documentary evidence in support of the motion. Accordingly, we determined that he did not show proper cause to warrant reopening.

B. Motion to Reconsider

With the current motion, the Petitioner submits a brief in which he once again criticizes USCIS policy guidance related to the adjudication of extraordinary ability immigrant petitions[1] and rejects our reliance on *Kazarian* as a basis for conducting a multi-part analysis that includes a final merits determination. Specifically, the Petitioner asserts that we imposed requirements not found in the statutory language by requiring the Petitioner to demonstrate his eligibility within a final merits analysis in our appellate decision after determining that he met three of the initial evidentiary criteria.

The Petitioner, however, does not articulate a claim that we misapplied this policy in our adjudication of his prior motion to reconsider. Rather, he maintains that we erred in our adjudication of the prior motions, and the underlying appeal, by adhering to *Kazarian* and applicable USCIS policy and asserts we should have looked to the reasoning in *Buletini* and other pre-Kazarian federal district court decisions in adjudicating our prior decisions.

[1] Current USCIS policy guidance governing extraordinary ability classification can be found at *6 USCIS Policy Manual* F.2(B)(2), https://www.uscis.gov/policy-manual/volume-6-part-f-chapter-2.

The Petitioner asserts that we misinterpreted the Ninth Circuit decision in *Kazarian,* as that decision only mentioned a second step in adjudicating petitions for individuals of extraordinary ability, the final merits determination, in dicta. The Petitioner argues that the proper analysis we should have applied was set forth in *Buletini*, a district court decision. The court in *Buletini* stated:

> Once it is established that the alien's evidence is sufficient to meet three of the criteria listed in [the regulation], the alien must be deemed to have extraordinary ability unless the INS sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard.

Buletini, 860 F. Supp. at 1234. Here, the Petitioner asserts that since he met at least three of the required criteria, he had demonstrated his extraordinary ability by a preponderance of the evidence, and argues that under *Buletini*, "it is the burden of USCIS to show, by competent and substantial evidence, that that the petitioner is nevertheless ineligible for the benefit sought."

The Petitioner's assertions are not convincing. While the court expressed the requirement that USCIS explain its reasons, it does not suggest the overall burden of proof shifts to USCIS.[2] In visa petition proceedings, the burden of proof rests with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Moreover, the court in *Buletini* did not reject the concept of evaluating the quality of the evidence at any time, and thus did not reject the possibility of a final merits determination. To the contrary, the court implicitly assumed some sort of final merits determination. It did not say that an officer was required to find extraordinary ability once they found the three initial evidentiary criteria satisfied. Rather, it said that, in such a case, the officer must explain their reasons if they ultimately find extraordinary ability is lacking, stating that that legacy INS, now USCIS, may deny a visa petition when it "sets forth specific and substantiated reasons for its finding that the alien, despite having satisfied the criteria, does not meet the extraordinary ability standard." *Buletini*, 860 F. Supp. at 1234. Thus, contrary to the Petitioner's assertions, *Buletini* and *Kazarian* are not in conflict.

The Petitioner also asserts that we erred in not incorporating the analysis from other district court cases that preceded *Kazarian*, such as *Muni v INS*, 891 F Supp. 440 (N.D. Ill. 1995), *Racine v. INS*, 995 U.S. Dist. LEXIS 4336, 1995 WL 153319 (N.D. Ill. Feb. 16, 1995), *Grimson v. INS*, 934 F. Supp. 965 (N.D. Ill. 1996), *Russell v. INS*, 2001 U.S. Dist. LEXIS 52 (E.D. Ill. Jan. 4, 2001) and *Gulen v. Chernoff*, 1980 U.S. Dist. LEXIS 54607 (E.D. Pa. Jul 16, 2008). As noted in our prior decision, we are not bound to follow the published decisions of a United States district court in cases arising within the same district, in contrast to the broad precedential authority of the case law of a United States circuit court (such as with *Kazarian*). *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before us; however, the analysis does not have to be followed as a matter of law. *Id*. at 719. Ultimately, the subsequent reasoning of a circuit court decision outweighs the reasoning of an earlier district court decision. Significantly, the *Kazarian* court cited *Buletini* for the nature of the individual's achievements in that case. Thus, the *Kazarian* court was aware of the decision in *Buletini* and still set forth a two-step procedure.

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[2] *See also Muni v. INS*, 891 F. Supp. 440, 443 (N.D. Ill. 1995) (including a "Totality of the Evidence" section that, like *Buletini*, requires USCIS to explain why evidence that meets three criteria does not establish eligibility, while not suggesting the burden shifts to USCIS).

The legal citations offered by the Petitioner do not establish that our latest decision was based on an incorrect application of law, regulation, or USCIS policy, or was incorrect based on the evidence of record at the time of the decision. Further, as already discussed, the Petitioner's assertion that we should have relied on *Buletini* and other pre-*Kazarian* federal district court decisions rather than *Kazarian* and binding USCIS policy guidance is not persuasive.

As such, the motion does not meet all the requirements of a motion to reconsider, and 8 C.F.R. § 103.5(a)(4) requires dismissal of the motion.

C. Motion to Reopen

As noted, a motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). Although the Petitioner indicated on the Form I-290B, Notice of Appeal or Motion, that he was filing a combined motion to reopen and motion to reconsider, the Petitioner has neither presented new facts in his brief nor submitted any documentary evidence in support of the instant motion.

Accordingly, we will dismiss the motion to reopen.

IV. CONCLUSION

For the reasons discussed, the Petitioner has not shown proper cause for reopening or reconsideration and has not overcome the grounds for dismissal of his prior motion to reopen and motion to reconsider. The motions will be dismissed for the above stated reasons.

ORDER: The motion to reopen is dismissed.

FURTHER ORDER: The motion to reconsider is dismissed.